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### Combating Midnight Regulation

Jack Beermann

*Boston Univeristy School of Law*

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## **COMBATING MIDNIGHT REGULATION**

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Jack M. Beermann

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## Combating Midnight Regulation

Jack M. Beermann\*

The flurry of regulatory activity by the outgoing administration of President George W. Bush has raised, once again, the specter of midnight regulation.<sup>1</sup> In contrast to the late-term action of the Clinton administration, much of this administration's late-term action seems to be more de-regulatory than regulatory, but from a political and legal standpoint, that distinction may not make much, if any, difference.<sup>2</sup> While midnight regulation provokes an instinctively negative reaction, it is not completely clear what is wrong with it. This uncertainty arises in part because of the different reasons for midnight regulation. In my earlier work on this subject, I identified four possible reasons for late-term action, and in this article I add a fifth, although I confess lack of knowledge on whether this fifth reason is a significant factor in midnight regulation. The original four from my earlier work are 1) the natural human tendency to work to deadline, which has been referred to in the literature as the "Cinderella constraint"<sup>3</sup>; 2) hurrying to take as much action as possible near the end of the term to project the administration's agenda into the future; 3)

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\* Professor of Law and Harry Elwood Warren Scholar, Boston University School of Law. [beermann@bu.edu](mailto:beermann@bu.edu). This is a preliminary draft that should not be quoted or cited without permission. © 2009, Jack M. Beermann, all rights reserved. Thanks to Gary Lawson and William P. Marshall for helpful discussion of the ideas in this article.

<sup>1</sup> "Midnight regulation" is loosely defined as late-term action by an outgoing administration. There are many types of midnight regulation and many reasons why the volume of administrative action tends to increase near the end of an administration. For a detailed look at the phenomenon, see Jack M. Beermann, *Presidential Power in Transitions*, 83 B.U.L. Rev. 947 (2003).

<sup>2</sup> I plan to investigate whether there are important legal or political differences between midnight regulation and midnight deregulation in a future article, tentatively titled "Midnight Deregulation." That article will examine the late-term regulatory actions taken by the G.W. Bush administration and analyze whether late-term deregulatory actions should be understood or treated differently from late-term regulatory actions.

<sup>3</sup> See Jay Cochran III, *The Cinderella Constraint: Why Regulations Increase Significantly during Post-Election Quarters*, (working paper, Mercatus Center at George Mason University 2001) (copy on file with author).

waiting to take potentially controversial action until the end of the term when the political consequences are likely to be muted and 4) delay by some external force that prevented the administration from taking desired action until late in the term. The fifth and new, possible reason for late-term action I call “timing.” Timing is a form of waiting but not because of potential negative consequences but rather to do something positive before the presidential election to help one’s own reelection bid or the election prospects of the incumbent party. One can imagine, for example, the President delivering an October surprise of favorable regulatory action for the automobile industry if Michigan looks like a swing state in the upcoming election.

Whatever the reason for midnight regulation, there seems to be a general consensus that something has gone wrong when an outgoing administration takes important action while the incoming administration is essentially waiting to take over. Most late term action is subject to the obvious question of “if this action was so important, why didn’t the administration take it in the last seven and three-quarters years or so?” The normative critique of midnight regulation is fairly obvious from each of the reasons posited for why the phenomenon exists. Even though the Constitution leaves the incumbent in office for approximately eleven weeks after election day, we feel uncomfortable when an outgoing administration waits until late in the term to take politically controversial action or loads up on late term actions to project its policy preferences in the future.

I want to highlight one of the problems with midnight regulation that may not be completely obvious. Especially as our collective experience with midnight regulation has

grown, the outgoing President knows that the incoming administration is likely to look carefully at late term actions by the outgoing administration. President George W. Bush certainly had plenty of experience with the time and energy it took for his administration to freeze and then review dozens of late-term actions taken by the Clinton administration.<sup>4</sup> Some late-term action is so likely to be overturned by the incoming administration that the outgoing administration may have acted merely to embarrass the new President or force the new President to expend political capital on the matter. Before they act, outgoing administrations should take into account the distraction and energy that reviewing late-term actions will take. The President takes an oath to “faithfully execute the office of President of the United States,”<sup>5</sup> and it arguably violates that oath if the outgoing President contributes to overloading the incoming administration with midnight rules and other late-term action to such an extent that it impedes the incoming President’s ability to “take care that that the laws be faithfully executed.”<sup>6</sup>

This article examines possible ways to combat midnight regulation, beginning with a recent proposal in Congress to restrict rulemaking activity during the last 90 days of an outgoing administration by giving the incoming administration the power to “disapprove” of regulations adopted in the final 90 days of a President’s term. The first part of the article explains the bill and identifies problems with it. The second part of the article offers two alternative approaches, one involving a simple reform to administrative law

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<sup>4</sup> See Beermann, *supra* note x at 949 n.6 (discussing Card memorandum issued by Andrew Card, White House Chief of Staff for the first five years of the administration of President George W. Bush, which suspended the effectiveness of some of the midnight rules of the Clinton administration).

<sup>5</sup> U.S. Const. Art. II, § 1.

<sup>6</sup> See U.S. Const. Art. II § 3; Jack M. Beermann & William P. Marshall, *The Constitutional Law of Presidential Transitions*, 84 North Carolina L. Rev. 1253 (2006)

and another outlining statutory proposals different from the bill proposed by Representative Nadler.

## I. Representative Nadler's Proposal

On January 6, 2009, Representative Jerrold Nadler of New York introduced H.R. 34.

This bill, the text of which is reproduced in the margin,<sup>7</sup> provides simply that "a midnight

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<sup>7</sup> 111th CONGRESS

1st Session

**H. R. 34**

To delay the implementation of agency rules adopted within the final 90 days of the final term a President serves.

**IN THE HOUSE OF REPRESENTATIVES**

**January 6, 2009**

Mr. NADLER of New York introduced the following bill; which was referred to the Committee on the Judiciary

### **A BILL**

To delay the implementation of agency rules adopted within the final 90 days of the final term a President serves.

*Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,*

### **SECTION 1. SHORT TITLE.**

This Act may be cited as the 'Midnight Rule Act'.

### **SEC. 2. RESTRICTIONS ON MIDNIGHT RULEMAKING.**

Title 5, United States Code, is amended by inserting after section 555 the following new section:

#### **'Sec. 555a. Restrictions on midnight rulemaking**

'(a) Rules Adopted in the Final 90 Days of a Presidential Administration- Notwithstanding section 801, a midnight rule shall not take effect until 90 days after the agency head is appointed by the new President.

'(b) Presidential Authority-

'(1) NOTICE- Notwithstanding any other provision of this section, a midnight rule that would not take effect by reason of subsection (a) may take effect if the President serving his final term makes a determination under paragraph (2) and submits written notice of such determination to the Congress.

'(2) EXCEPTIONS- A determination under this paragraph is a determination made by the President by Executive Order that the midnight rule should take effect because such rule is--

'(A) necessary because of an imminent threat to health or safety or other emergency;

'(B) necessary for the enforcement of criminal laws;

'(C) necessary for national security; or

'(D) issued pursuant to any statute implementing an international trade agreement.

'(3) EFFECT ON CONGRESSIONAL DISAPPROVAL PROCEDURES- An exercise by the President of the authority under this subsection shall have no effect on congressional disapproval procedures under section 802 or congressional review under section 801.

'(c) Disapproval by a New Agency Head-

'(1) DISAPPROVAL- The agency head appointed by the new President may disapprove of a midnight rule no later than 90 days after being appointed.

rule [“adopted in the last 90 days of a Presidential Administration”] shall not take effect until 90 days after the agency head is appointed by the new President.” The bill would also allow the incoming agency head to “disapprove of a midnight rule” within 90 days of being appointed.

Regardless of what one thinks about the desirability of accomplishing the bill’s goals, the bill as written suffers from numerous flaws, a few of which I will detail. First, it is necessary to explain how the bill would operate. As noted, the fundamental provision of the bill is that no rule adopted in the final 90 days of an outgoing administration (a “midnight rule”) can go into effect until 90 days after the appointment of a new agency head by the new President. The newly appointed agency head may, during his or her first 90 days in office, disapprove of a midnight rule by publishing notice of disapproval in the Federal Register and providing notice of disapproval to “the congressional committees of jurisdiction.” If the new agency head takes no action, the midnight rule goes into effect.

The bill would allow the outgoing President, by Executive Order, to put a midnight rule into effect, by declaring in an Executive Order that the rule is necessary because of “an imminent threat to health or safety or other emergency; necessary for the enforcement of

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`(2) PROCEDURE- The agency head appointed by the new President may disapprove a midnight rule by publishing a statement of disapproval in the Federal Register and sending a notice of disapproval to the congressional committees of jurisdiction.

`(d) Definitions- The term `midnight rule' means a rule adopted by an agency within the final 90 days a President serves in office.'

**SEC. 3. CLERICAL AMENDMENT.**

The table of contents of chapter 5 of title 5, United States Code, is amended by inserting after the item relating to section 555 the following new item:

`555a. Midnight rulemaking.'

**SEC. 4. EFFECTIVE DATE.**

The amendments made by this Act shall apply to any rule adopted on or after October 22, 2008.

criminal laws; necessary for national security; or was issued pursuant to a statute implementing an international trade agreement.” The President must submit written notice of this determination to Congress. (This provision is copied verbatim from the Congressional Review Act<sup>8</sup> except for the addition of the requirement that the President act by Executive Order.) The bill also provides that the outgoing President’s determination that a midnight rule should go into effect does not deprive Congress of its authority to reject a rule under the Congressional Review Act. The bill further provides that it applies retroactively to all rules issued after October 22, 2008, which is 90 days before President Barack Obama’s inauguration.

Even a cursory reading of the bill reveals that it has some relatively serious drafting problems. I focus on a few of the operational issues that make the bill a less than ideal solution to the midnight regulation problem.

The first problem is that the bill delays the effective date of all rules adopted in the last 90 days of an outgoing administration until 90 days after the appointment of a new agency head, whether the incoming administration is of the same party or whether the incoming administration would rather have the midnight rules go into effect. There is no provision for allowing an incoming President to allow all or some midnight rules to go into effect immediately. The bill grants only the outgoing President the authority to place midnight rules directly into effect. In some circumstances, and perhaps especially in times of crisis when quick and decisive action is necessary, incoming and outgoing administrations may

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<sup>8</sup> 5 U.S.C. §§ 801 et. Seq.



work together to take action without regard to the election and inauguration cycle and no one wants the delay imposed by the bill.

The blanket delay of midnight rules may not be as politically beneficial to the incoming President as it may appear. There may be instances in which the phenomenon of “waiting” until after election day, when a President may act with less regard for the political consequences, works to the benefit of the incoming administration. An outgoing President acting responsibly may take difficult action at the end of the term to pave the way for a smooth transition; the bill would automatically delay the effective date of rules in this category unless the outgoing President uses the authority to advance the effective date discussed above. This would raise the political costs to the outgoing administration and thus discourage this sort of cooperative action.

By automatically delaying all midnight rules until the appointment of a new agency head, the incoming administration is placed in the potentially uncomfortable position of appearing responsible for every rule issued in the last 90 days of the outgoing administration. Newly appointed agency heads may then have to spend their first 90 days reviewing midnight rules rather than beginning to work on the new President’s agenda. From a different perspective, however, the Nadler bill’s blanket delay of all midnight rules may be seen as a virtue. By automatically delaying all midnight rules, the incoming administration can at least delay the day of reckoning until the 90<sup>th</sup> day after the appointment of a new agency head. If the incoming administration was granted discretion to pick and choose among midnight rules to delay, intense pressure may be

brought to bear at the very outset of the administration, and the new agency heads may be forced to act with great haste in a tense environment. It is a judgment call whether discretion is better or worse than an automatic delay, and for reasons discussed in Part II B, in my view the potential benefits of discretion outweigh its potential costs.

Another problem, perhaps less likely to occur, is that the bill could place midnight rules into limbo for extended periods of time. The effective date for midnight rules is 90 days after the appointment of a new agency head, during which time the agency head has the authority to disapprove the rule. There is no provision for a holdover agency head, i.e. it seems that if the incoming President chooses to keep the outgoing administration's agency head in place, if this bill were in effect, rules issued in the last 90 days of the outgoing administration may not go into effect for many months or years. This may seem to be a hyper-technical reading of the bill, but a subject of a midnight rule may have a legal argument that the rule has not gone into effect if there is no new agency head. This is obviously an unintended consequence--no one wants to discourage a new President from keeping agency heads from the prior administration in office. A lengthy delay could also result if the appointment of a new agency head is delayed because of a confirmation problem or if the incoming administration falls behind in naming new agency heads. Of course, if one views midnight rules as virtually always a scourge, then the potential for indefinite delay will not be viewed as much of a problem. But it does not seem likely that the author of the bill intended to create the possibility of indefinite delays in the effective dates of rules.

The only exception in the bill is for rules put into effect through the outgoing President's power to use an Executive Order specifying important reasons for putting a midnight rule into effect immediately. There is no indication that rules required by statutory deadlines or court orders are exempt, and there is nothing about rules not subject to APA notice and comment procedures. Is the intent to include personnel rules and rules relating to government contracts, grants and benefits, which are completely exempt from APA § 553? What about interpretative rules, policy statements and guidance documents that are exempt from § 553's notice and comment provisions? These issues should be clarified before a bill like this is adopted. As is discussed in more detail below, because exempt rules of both types are so easy to revise, midnight rule reform should not apply to them.

The bill also is not very specific about which agencies are subject to it. Because the bill would be inserted into the APA, as 5 U.S.C. § 555a, presumably the APA's definition of "agency" would apply. This definition is very broad and includes independent agencies such as multi-member commissions and the National Labor Relations Board, and the bill does not on its face exempt independent agencies from its coverage. However, the bill is not designed for application to independent agencies, and there are good reasons to not extend coverage of the bill to independent agencies. First, the bill does not identify an "agency head" for a multi-member agency. Is it the agency chair, or a majority of the agency? Since new Presidents upon taking office do not normally appoint new agency heads for independent agencies, if the bill is construed as applying to such agencies, it could force independent agencies to forego issuing rules for the last 90 days of each presidential term. Second, the midnight rule problem is not as serious with regard to

independent agencies because they are bi-partisan and because their members serve for terms of years that do not coincide with the presidential election cycle. Out of loyalty to the President, independent agencies dominated by the incumbent's party may time certain actions with the political consequences to the President in mind or to avoid rejection by the next Congress. However, because independent agencies are not subject to direct supervision by any Executive Branch official, they are less likely than Executive Branch agencies to be acting for the reasons that contribute to the general disfavoring of midnight rules. Midnight rule reform is simply not needed for independent agencies.

Another significant problem with the bill is that the incoming administration's only option is to disapprove the midnight rule or allow it to go into effect as written.<sup>9</sup> There is no option to revise a midnight rule. This means that if the new agency head concludes that some sort of rule is necessary, even one that is very close but not exactly the one promulgated by the prior administration, the agency must either accept the imperfect rule or engage in an expensive and time consuming rulemaking proceeding to promulgate what might be an only slightly different rule. This can be a real waste given that the rulemaking record produced by the prior administration is still pretty fresh and is likely to support the rule preferred by the new administration. The bill could lead either to waste or to a new administration allowing a sub-optimal rule to go into effect.

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<sup>9</sup> The procedure for disapproving a rule contains a quirk that should be abandoned. It provides that the agency head disapproving a rule does so by "publishing a statement of disapproval in the Federal Register and sending a notice of disapproval to the congressional committees of jurisdiction." The problem is with the requirement that notice go to the "congressional committees of jurisdiction." The agency head should be required to send notice to Congress and allow Congress itself to decide which committees should be informed. Agency jurisdiction is a matter of legislative rule which agency heads cannot interpret authoritatively. The agency head could, as a courtesy, send notice to any committee that is known to engage in oversight of the particular administrative function, but the effectiveness of the disapproval should not depend on the agency making an accurate determination of which committees have jurisdiction over the matter in the disapproved rule.

There are a few less serious procedural problems with the bill. Because the bill defines a midnight rule as “a rule adopted by an agency within the final 90 days a President serves in office,” there are two situations in which it will not be immediately known that a rule is a midnight rule. First, if the President is running for reelection, it will not be known until after election day if a rule adopted before Election Day, and less than 90 days before January 20, (this year between October 22 and November 4) is a midnight rule. This is not a serious problem, because it throws into uncertainty only rules adopted in the last two weeks before election day, and none of these rules will have yet gone into effect since no rule’s effective date can be less than 30 or 60 days after adoption, depending on whether it is a major rule subject to the Congressional Review Act. Nonetheless, it seems at least odd that an agency can adopt a rule not knowing whether it will go into effect as stated in the rule (in as little as 30 days) or not until 90 days after Inauguration Day which could amount to a delay of 180 days.

The second situation is less likely to occur but involves the potential for an unexpected application of the bill. If a President dies in office or resigns, under the bill it appears that all rules issued in the prior 90 days become midnight rules subject to the bill, which would automatically delay their effective date until 90 days after the new President (normally the incumbent Vice-President) appoints new agency heads for all agencies that had issued rules in the 90 days before the President died or resigned. This could result in 180 days of uncertainty even when no one thinks that the prior President had acted for any of the reasons we normally attribute to the midnight regulation problem. Perhaps

midnight regulation concerns would exist if a President is in a political fight that appears headed for impeachment or resignation (think Illinois Governor Rod Blagojevich's appointment of Roland Burris to fill Barack Obama's Senate seat while under indictment and subject to impeach proceedings). Midnight regulation in such circumstances may raise eyebrows, but it still does not seem to be likely enough to require reform. In the case of the death of a President while in office, the likelihood that a dying President is managing a flurry of midnight regulation in the days before death is so remote that there is no good reason to apply midnight rule reform to this situation. This is all the more true given that the new President, being the incumbent Vice-President, is almost certainly of the same political party as the prior President and may retain, at least for a time, many of the prior President's agency heads, which would lead to the problem of prolonged delay discussed above when no new agency head is appointed.

Another troubling procedural issue is that the bill does not contain a definition of the word "adopted." What is the precise event that indicates that an agency has adopted a rule. There are several possibilities including publication in the Federal Register, submission to the Federal Register for publication, signing a paper indicating that the agency has adopted a rule and so on. Any bill on this subject should make it crystal clear what it means for a rule to be "adopted."

For these reasons and more, the bill proposed by Representative Nadler is not an attractive vehicle for midnight rule reform. However, this does not mean that some form

of midnight regulation reform is not desirable or possible to design. The next section proposes two different tacks for such reform.

## II. Midnight Regulation Reform Possibilities.

This Part raises two different tacks for dealing with midnight regulation. The first takes on a particular feature of administrative law that makes it difficult for an incoming administration to repudiate late-term action by the outgoing administration. Basically, under current doctrine, once a rule goes into effect, any change must be justified by good reasons for change even if the original rulemaking record would have justified the result put forward as the alternative. In the context of midnight regulation, this is unfortunate. The Supreme Court could loosen up on arbitrary and capricious review in cases involving changes to rules in transition periods or more generally soon after the issuance of the original rule, or Congress could legislatively provide for more deferential review. The second outlines a statutory model that would grant the incoming administration the power to review and reject or modify late-term action by the outgoing administration, similar to the model that President George W. Bush's administration followed when it confronted the mass of midnight regulation left behind by the Clinton Administration. This model is not different in principle from the bill proposed by Representative Nadler, but it takes a more nuanced approach that is more sensitive to the political and legal realities of midnight regulation. Finally, a simpler approach is raised, which would allow agencies at all times to revise or rescind recently issued rules when unexpected negative feedback erupts after a rule is issued.

This discussion assumes that some sort of reform that would make it easier to combat midnight regulation is desirable. It should be noted that even if it is agreed that midnight rules tend to be problematic, it is not completely obvious that reform is necessary.

Presidents may already have sufficient tools to deal with midnight regulation, as we have seen by action taken by the administrations of Presidents Ronald Reagan, Bill Clinton and George W. Bush to combat the midnight regulatory activity of their respective predecessors. President Bush, for example, suspended the effective date of numerous midnight rules to allow his appointees to review and perhaps revise them. While the short duration of a temporary suspension may often preclude resolution of a legal challenge while the controversy remains live and justiciable, in a decision involving the suspension of a midnight rule by the Bush administration, the D.C. Circuit held that once the rule was finalized and published in the Federal Register, in this case on January 22, 2001, two days after President George W. Bush took office, it took effect and could not be suspended or altered without notice and comment.<sup>10</sup> Thus, it appears that there is a need for reform in the possibly rare situation in which a controversy regarding action against midnight rules is subject to legal challenge.

#### A. Administrative Law Reform

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<sup>10</sup> *Natural Resources Defense Council v. Abraham*, 355 F.3d 179 (2d Cir. 2004). This case involved a rule regarding the energy efficiency of central air conditioning and heat pumps. The statutory structure underlying this rule caused it to be a particularly tricky midnight rule to deal with because under the statute, in what the court called an “anti-backsliding provision,” the agency (Department of Energy) was prohibited from ever lowering efficiency standards—new rules could only increase efficiency. So, once the court held that the rule was final and effective when published in the Federal Register, the Department was stuck with it. See *id.* at 197.



The outgoing administration of G.W. Bush was careful to shield its late-term output from revision by the incoming Obama administration. Josh Bolten, President Bush's Chief of Staff, issued a memorandum on May 9, 2008, instructing agencies not to propose any new rules after June 1, 2008 and to finalize all rules by November 1, 2008. The Bush administration attempted to portray this as taking the high road against midnight regulation by avoiding the unseemly specter of rules being published in the Federal Register up to and even past Inauguration Day, as had occurred at the end of the Clinton Administration, but in truth it was part of an effort to shield its midnight rules from the action that it had taken against President Clinton's midnight rules. Rules completed more than 60 days before Inauguration Day would be final and thus not subject to a freeze or easy process of revision by the new administration. What Bolten was doing was providing agencies a roadmap for avoiding what the Bush administration was able to do to some of the Clinton administration's midnight rules.

The Supreme Court's application of the arbitrary and capricious standard to rescission and revision of rules has created some of the difficulties that incoming administrations have in trying to undo midnight rules. Under the Airbags Case, once a rule becomes final, rescission or revision must be justified with reference to reasons for the rescission or revision even if the original record would have supported a different rule or a decision not to adopt any rule.<sup>11</sup> This understanding gives an administration a powerful tool, for better or for worse, to project its agenda beyond the end of its term.

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<sup>11</sup> Motor Vehicle Manufacturers Assoc. v. State Farm Mutual Automobile Ins. Co., 463 U.S. 29 (1983).

Take the Airbags Case as an example. The Carter Administration's rule requiring passive restraints in passenger cars was promulgated in 1977, the first year of the Carter Administration, but it did not require any car to be equipped with passive restraints until 1982, the second year of the next presidential term.<sup>12</sup> This put the Reagan Administration in the uncomfortable position of being the first administration to enforce this regulation even though it did not agree with the regulation and had actually campaigned on a deregulatory platform which was inconsistent with the regulation. When the Reagan Administration's new agency head attempted to rescind the requirement, the Court did not ask whether the original rulemaking record would have supported a decision to make no rule at all. Rather, it asked whether there was sufficient new evidence or policy reasons for rescinding the rule that had been adopted. As soon as the initial regulation was adopted, it became the baseline for evaluating future agency action even though it had not actually gone into effect.<sup>13</sup>

I have argued elsewhere that this application of the arbitrary and capricious standard should be reexamined.<sup>14</sup> In my view, when a new administration takes office, it should have the freedom to revise or rescind rules that were adopted by the prior administration if the original rulemaking record would have supported the new administration's decision,

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<sup>12</sup> See Modified Standard 208, 42 Fed. Reg. 34289 (1977). There is nothing necessarily nefarious about time lines like this—it makes perfect sense in many situations for new rules to be phased, strengthened or even weakened over a long period of time, and in this case the automobile manufacturers needed a substantial amount of time to prepare for compliance with the rule. Long lag times can also facilitate the exploration of other options. For example, one feature of the passive restraint rule would have rescinded the requirement entirely had two-thirds of states adopted laws requiring auto occupants to wear seatbelts within a certain time. Ultimately, Congress acted to require airbags in all cars, which is more satisfactory than agency action from a democratic standpoint.

<sup>13</sup> See also *Natural Resources Defense Council v. Abraham*, 355 F.3d 179 (2d Cir. 2004) (holding that once energy efficiency rules were published in the Federal Register, they could not be altered in way that violated statute's anti-backsliding provision).

<sup>14</sup> Beermann, *supra* note x at 1009-15.

at least with regard to rules that can fairly be characterized as midnight regulation.<sup>15</sup> The baseline should be the statute and regulatory situation before the outgoing administration acted. An objection can be raised that this idea pays insufficient heed to the role of agency expertise and makes regulation look overly political, but this objection presumes that midnight regulation is less political than the potential reactions of the incoming administration. To the contrary, there are good reasons to believe that a great deal of late-term administrative action is political, and that in the rush to deadline even action motivated largely by expertise is more likely to contain errors than action taken under less time pressure.

Two developments in administrative law lend support to the idea that a different application of the arbitrary and capricious standard to midnight regulation is possible within the constraints of the law. The first is the recent recognition, under the Chevron rubric, that agencies are free to reinterpret statutes even when a prior agency interpretation has been upheld on judicial review.<sup>16</sup> Under step two of the Chevron doctrine, which is reached when an agency interprets an ambiguous statute, a court defers to any reasonable interpretation. The Courts decision in the Brand X case<sup>17</sup> made clear what had been pretty well understood before, that because Chevron step two is a very deferential standard of judicial review under which various interpretations might have been upheld, agencies are free to alter their interpretations as long as the new interpretation is also reasonable. The baseline against which the new interpretation is judged is not the initial interpretation but the statute being interpreted.

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<sup>15</sup> See *id.* at 1014.

<sup>16</sup> *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.* 467 U.S. 83 (1984).

<sup>17</sup> *National Cable & Telecommunications Assn. v. Brand X Internet Services*, 545 U.S. 967 (2005).

The analogy between the two situations is strengthened by the fact that the Supreme Court is fully aware that interpretation under *Chevron* is not simply a quest for the best understanding of the meaning of the words Congress used but rather involves choosing among plausible interpretations based at least in part on considerations of policy. The *Chevron* decision recognized this when it stated:

In these cases, the Administrator's interpretation represents a reasonable accommodation of manifestly competing interests, and is entitled to deference: the regulatory scheme is technical and complex, the agency considered the matter in a detailed and reasoned fashion, and the decision involves reconciling conflicting policies. . . . While agencies are not directly accountable to the people, the Chief Executive is, and it is entirely appropriate for this political branch of the Government to make such policy choices -- resolving the competing interests which Congress itself either inadvertently did not resolve, or intentionally left to be resolved by the agency charged with the administration of the statute in light of everyday realities.<sup>18</sup>

In its *Brand X* decision, the Court reiterated this understanding: “In *Chevron*, this Court held that ambiguities in statutes within an agency’s jurisdiction to administer are delegations of authority to the agency to fill the statutory gap in reasonable fashion. Filling these gaps, the Court explained, involves difficult policy choices that agencies are

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<sup>18</sup> *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.* 467 U.S. 837, 865-66 (1984) (footnotes omitted).

better equipped to make than courts.”<sup>19</sup> Thus, the Chevron doctrine, as applied in *Brand X* to allow an agency to adopt a new, reasonable, interpretation, represents an instance of policy alteration in which the baseline is the original statute and situation rather than the intervening policy that is being repudiated. There is no apparent reason why an incoming administration should not enjoy the same freedom to repudiate the late-term actions of its predecessor when the policies involved do not all into the Chevron interpretive framework.

Chevron, together with additional instances detailed below, also stands for the proposition that the application of the arbitrary and capricious standard can vary with the circumstances. The APA standard of judicial review that applies to agency rules is the arbitrary and capricious standard.<sup>20</sup> The Chevron opinion paraphrased this standard but then constructed what appeared to be a wholly new standard to apply to agency statutory interpretation. Its paraphrase even pointed to the more deferential direction in which it was headed.<sup>21</sup> In at least two additional situations, the Court has explicitly endorsed a more lenient than usual application of the arbitrary and capricious standard based on the context of the agency action involved. In *Massachusetts v. EPA*,<sup>22</sup> the decision rejecting the EPA’s refusal to regulate global warming gases, in the course of explaining its determination that agency decisions rejecting rulemaking petitions are subject to judicial review under the arbitrary and capricious standard, the Court quoted with apparent

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<sup>19</sup> *National Cable & Telecommunications Assn. v. Brand X Internet Services*, 545 U.S. 967, 980 (2005).

<sup>20</sup> 5 U.S.C. § 706(2)(A).

<sup>21</sup> The Chevron Court stated that “legislative regulations are given controlling weight unless they are arbitrary, capricious, or *manifestly* contrary to the statute.” 467 U.S. at 843. This is a paraphrase of the APA’s “arbitrary, capricious, an abuse of discretion or otherwise contrary to law.” The Court inserted the word “manifestly” apparently in order to provide for deference to agency legal interpretations which does not appear to be provided for in the statute as written.

<sup>22</sup> 549 U.S. 497, 527 (2007).

approval the D.C. Circuit's rule that such decisions are reviewed on a very deferential standard: "Refusals to promulgate rules are thus susceptible to judicial review, though such review is 'extremely limited' and 'highly deferential.'"<sup>23</sup>

This highly deferential version of the arbitrary and capricious review is similar to the standard that the Court says applies to review of agency refusals to bring enforcement actions (when such refusals are reviewable because governing law contains clear criteria for when enforcement is required). In such cases, the Court has stated that review should be very narrow, that the reviewing court should ordinarily look only at the statement of reasons the agency has provided for not bringing an enforcement action and that the reviewing court should not even consider the factual basis for the decision or facts offered in opposition to the decision.<sup>24</sup> This is a far cry from the usual practice in cases applying the arbitrary and capricious standard in which the reviewing court looks carefully at the facts and reasoning underlying the decision in what has been denominated "hard look" review.<sup>25</sup>

The lesson to be learned from this discussion is that the arbitrary and capricious standard is not a static principle that applies uniformly in all contexts. Rather, the Court has found

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<sup>23</sup> *Massachusetts v. EPA*, 549 U.S. 497, 527 (2007) quoting *National Customs Brokers & Forwarders Assn of America, Inc. v. United States*, 883 F. 2d 93, 96 (D.C. Cir. 1989).

<sup>24</sup> In *Dunlop v. Bachowski*, 421 U.S. 560, 573 (1975), the Court stated that review of a refusal to initiate enforcement action should be very narrow and not ordinarily look at the record beyond the bare reasons offered by the agency for not enforcing "The necessity that the reviewing court refrain from substitution of its judgment for that of the Secretary thus helps define the permissible scope of review. Except in what must be the rare case, the court's review should be confined to examination of the 'reasons' statement, and the determination whether the statement, without more, evinces that the Secretary's decision is so irrational as to constitute the decision arbitrary and capricious. Thus, review may not extend to cognizance or trial of a complaining member's challenges to the factual bases for the Secretary's conclusion . . ."

<sup>25</sup> See *Citizens to Preserve Overton Park v. Volpe*, 401 U.S. 402 (1971); *Motor Vehicle Manufacturers Assoc. v. State Farm Mutual Automobile Ins. Co.*, 463 U.S. 29 (1983).

it appropriate to adjust the scope of review under the statutory standard when it finds a different standard more appropriate. While the Court in the Airbags case rejected the argument that review should be relaxed when an agency deregulates, that decision does not necessarily entail a rejection of the desirability of an adjustment when an incoming administration acts to deal with midnight regulation by its predecessor. Current law may grant too much sanctity to the output of an administration in its death throes, and making it easier for an incoming administration to alter late term action may discourage midnight regulation in the first place.

In conclusion, although the focus here is on midnight regulation, I should add that my proposal for reform should probably not be confined to that problem but rather might be extended to increase agency flexibility whenever an agency changes its position shortly after issuing a rule. If an agency issues a rule and the rule causes an outcry, either right after issuance or perhaps as a more distant effective date approaches, there are good reasons for allowing the agency to make revisions without using the initial rule as a baseline to measure the permissibility of change. At this early stage in the life of the rule, the agency ought to be able to re-shape the rule in any way that would have been supportable based on the original rulemaking record. In addition to preserving a measure of flexibility, this would also have a desirable procedural effect. The Supreme Court adverted to the “inherent advantages of informal rulemaking” when it rejected the argument that courts have the power to require additional procedures in complicated or important rulemaking proceedings.<sup>26</sup> Flexibility in the immediate post-notice and

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<sup>26</sup> See *Vermont Yankee Nuclear Power Corp. v. Natural Resources Defense Council, Inc.*, 435 U.S. 519, 547 (1978)

comment period would allow an agency to issue a rule after a single notice and comment period knowing that if the rule provokes an unanticipated outcry, revisions supportable under the original record could still be made. Without this flexibility, agencies might be more reluctant to make desirable revisions if that would require a new notice and comment period and greater justification. They might be more cautious during the initial rulemaking proceeding, perhaps by adding a second notice and comment period if there is any perceived likelihood that a rule will provoke a strong negative reaction. While some people might think more notice and comment would be a good thing, the Supreme Court's preference is to follow Congress's model of a short and sweet notice and comment process.<sup>27</sup>

#### B. Alternative Statutory Possibilities.

Assuming that the Supreme Court declines the invitation to build a solution for the midnight regulation problem into administrative law, another possibility is for Congress to create a statutory solution along the lines of Representative Nadler's proposal but without the defects of that particular bill. The key would be to design a proposal that discouraged the outgoing administration from engaging in midnight rulemaking or gave the incoming administration effective tools to deal with it or both.

Despite its limitations, Representative Nadler's bill could serve as the basis for a better proposal if the problems identified with it in the first section of this Article were

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<sup>27</sup> Id. See generally Jack Beermann & Gary Lawson, Reprocessing Vermont Yankee, 75 Gw. L. Rev. 856 (2007).



remedied. Most of the problems with the bill would be solved with a few simple changes. 1. The bill should define midnight rules as final rules adopted by an agency in the 90 days before Inauguration Day, i.e. October 22 through January 20 in election years. “Adopted” should be defined as something like “finalized and sent to the Federal Register for publication as required by law.” These changes would clarify the timing issues—the bill should apply only to presidential transitions in election years, and whether a bill is a midnight rule should depend on when it is finalized by the agency head and put in the queue for publication in the Federal Register.

2. The bill should give the incoming administration the option to suspend midnight rules for a certain period after Inauguration Day, perhaps 60 days, rather than suspend all midnight rules automatically. If the incoming administration takes no action within the 60 day period, the rules should go into effect as adopted. This avoids the uncertainty of tying the time period to the appointment of a new agency head, which may not happen at all if the incoming administration is of the same party or if there are holdovers from the prior administration, or for a long time if there is a delay in naming or confirming an incoming agency head. Making action optional with the new administration is preferable to a blanket automatic suspension because it allows the incoming administration to focus its attention on issues it finds important. This could have the negative effect of forcing the incoming administration to examine all midnight rules quickly, but it seems to be a better alternative than a blanket suspension. This preference is based partly on the perhaps naïve hope that future administrations will seek to avoid midnight rulemaking as consciousness of the problem increases.

3. The incoming administration should have the option to alter as well as disapprove midnight rules, assuming that the alteration would be supported by the original rulemaking record. If the agency finds it advisable to make changes beyond those supportable under the original rulemaking record, the agency should have the power to suspend a midnight rule to allow the time to conduct a new rulemaking proceeding. Under Representative Nadler's proposal, review is an all-or-nothing proposition. This ignores the possibility that the incoming administration will find only some of the features of a midnight rule objectionable. It is easy to imagine the incoming administration objecting only to a limited number of features of a large midnight rule, and there is no reason for not allowing amendments rather than wholesale rejection. Because of the fear that midnight rules may be undesirable due to hasty drafting and excessive interest group involvement, the incoming administration should have the time to conduct a new rulemaking if it decides one is necessary, without the midnight rule going into effect. Administrations have done this without specific authorization. For example, the Clinton administration suspended the abortion gag rule in its first week in office and did not promulgate a substitute until its last year in office.<sup>28</sup> It would be better if the incoming administration acted with statutory authority rather than create a situation of doubt and potential costly litigation.

4. "Agency" should be defined in the bill to include only Executive Branch agencies and not independent agencies that are less subject to presidential control. The worst dangers of midnight regulation relate virtually exclusively to the politics of the presidential

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<sup>28</sup> See Beermann, *supra* note x at 963-64.

transition. As explained above, because independent agencies are not subject to much if any presidential control, midnight rules issued by them are less likely to be designed to embarrass or hinder the incoming administration or to project an administration's policies into the future. Further, "midnight" at an independent agency may come later, when expiring terms or impending resignations shift control of the agency to members of the new President's party. It would be very difficult and probably unnecessary to write a statute that identified the proper time during which an independent agency's rulemaking activity should be curtailed due to the possibility of midnight regulation.

5. Rules not subject to notice and comment should not be included in any midnight rule reform, mainly because the incoming administration could very easily alter any such midnight rule under current law.<sup>29</sup> If an outgoing agency issues a policy statement or interpretive rule in its waning moments, the incoming agency can simply issue a new rule without delay. While this would have some of the negative effects of midnight regulation discussed above, the lack of substantive effect and the ease of rescission or amendment make midnight interpretive rules and policy statements a much less serious problem than midnight legislative rules.

In addition to the above proposals which are designed to cure the defects in

Representative Nadler's approach, another statutory possibility would be to enact a more

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<sup>29</sup> There are two sets of exceptions to the APA's notice and comment requirements. First, the APA rulemaking provision does not apply to rules involving military and foreign affairs functions and rules relating to "agency management or personnel or to public property, loans, grants, benefits, or contracts." 5 U.S.C. § 553(a). The notice and comment provisions of the rulemaking provision does not apply to "interpretative rules, general statements of policy, or rules of agency organization, procedure, or practice." 5 U.S.C. § 553(b). Publication requirements may still apply. See 5 U.S.C. § 552(a)(1)(D).

general reform to deal with the administrative law issues identified in section A above. A provision could be crafted that would give all agencies the power to revise or rescind rules shortly after adoption to provide for revisions based on midnight regulation problems or simply second thoughts after promulgation even in the absence of a transition in administrations.<sup>30</sup> This provision could, for example, give all agencies the power to revise or rescind rules within 90 days of adoption without a new rulemaking proceeding if the new rule (or no rule at all) would have been supported adequately by the original rulemaking record. This provision has two virtues—it is simpler than one focused on the midnight rulemaking problem and it increases regulatory flexibility in all periods, transition or not.

Another simpler proposal that might be considered is to ban outright the adoption of final rules by Executive Branch agencies for a period of time prior to Inauguration Day, for example 120 days, with exceptions for rules required by emergency, statutory deadline or court order. This possibility has several virtues. For one, it would reduce the load that incoming administrations currently bears—there would be few or no midnight regulations to sift through since all regulations would have been finalized longer before election day than is currently the case. While this reform might be viewed as an empty gesture since it would merely move up the deadline, in effect changing the clock and making midnight come a few months early in election years has the additional virtue of placing all late-

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<sup>30</sup> A statute to this effect may have led the D.C. Circuit to allow President George W. Bush's Department of Energy to act against the last-minute rule issued by Clinton administration concerning the energy efficiency of central air condition and heat pumps that the D.C. Circuit held the Bush administration could not revise in *Natural Resources Defense Council v. Abraham*, 355 F.3d 179 (2d Cir. 2004). It is unclear whether this statutory reform would override the anti-backsliding provision of the statute at issue in *Abraham*, but in most situations it would allow agencies to adjust their rules for a brief period after issuance.

term rules in the sunshine of the public record long enough before election day for the public to be made aware of them. This should discourage many midnight rules that appear to be farewell gifts to interest groups. It would, however, not allow cooperation between incoming and outgoing administrations in my “waiting category” within which a cooperative outgoing administration clears away difficult issues late in the term as an aid to the incoming administration. Further, the ban would apply even when it would not be necessary, for example when an incumbent is reelected or when the new President is of the same party as the prior President. It also assumes the worst—that all outgoing administrations are behaving badly rather than carrying on the business of government to the end perhaps even in consultation with the incoming administration. An outgoing President might decide to take the high road and not allow the impending stroke of midnight to influence administrative action. In such cases, the work of career agency employees could needlessly be slowed to a crawl every four years around election time.

### III. Conclusion

Recent research confirms that midnight regulation has long been a feature of the transition between administrations.<sup>31</sup> There seems to be a general view that midnight regulation is an illegitimate vehicle for projecting an outgoing administration’s policy agenda beyond the end of its term. For this and additional reasons for disfavoring midnight regulation, Representative Jerrold Nadler’s proposed Midnight Rule Act is a step in the right direction. With refinements discussed above, it might prevent some of

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<sup>31</sup> See Antony Davies & Veronique de Rugy, *Midnight Regulations: An Update*, Mercatus Center Working Paper (2008) (copy on file with author).

the most egregious examples of midnight regulation. Reforms to administrative law, or simpler proposals that simply suspend rulemaking activity at the end of each presidential term, might accomplish the same goal. This article has outlined and analyzed these various possibilities with the hope of enhancing the understanding of ways of combating midnight regulation.